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No. 86-1133

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

TENNECO OIL COMPANY,
Petitioner,

v.

KERN OIL & REFINING CO.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

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1. The court below upheld denial of Tenneco's motion for voluntary dismissal, and the dismissal of its counterclaim with prejudice, when the only prejudice to Kern was the expense of preparation for trial. Most circuits addressing the question have held that the mere expense of preparation for trial is not legal prejudice justifying denial of a motion for voluntary dismissal. *See, e.g., Alamance Industries, Inc.* v. *Filene's*, 291 F.2d 142, 147 (1st Cir.), *cert. denied*, 368 U.S. 831 (1961); *Durham* v. *Florida East Coast Railway Co.*, 385 F.2d 366, 368 (5th Cir. 1967); *Kern* v. *TXO Production Corp.*, 738 F.2d 968, 970 (8th Cir. 1984); *McCants* v. *Ford Motor*

Co., Inc., 781 F.2d 855, 856-857 (11th Cir. 1986). Some circuits—like the court below—have arrived at the opposite conclusion. *See Andes* v. *Versant Corp.*, 788 F.2d 1033, 1036 (4th Cir. 1986); *Ferguson* v. *Eakle*, 492 F.2d 26, 29 (3d Cir. 1974). Nothing in Kern's Brief in Opposition ("Br. Opp.") mitigates the seriousness of this existing conflict in the interpretation of Federal Rule 41, or diminishes the need for this Court to resolve that conflict.

2. Kern seeks to avoid this question by contending that Tenneco was motivated by impermissible forum shopping. The contention is wholly unfounded. It was Kern—not Tenneco—that chose to file separate actions arising out of the same contract. Tenneco's counterclaim was not only common to both actions but was compulsory in both actions, and accordingly Tenneco had no prudent alternative but to file it in both cases. As this Court clearly held in *Southern Construction Co., Inc.* v. *Pickard*, 371 U.S. 57, 60-61 (1962), a counterclaimant with a compulsory counterclaim common to two pending actions has the right to pursue the counterclaim in his choice of the actions. Tenneco simply exercised that right, choosing to pursue its supply counterclaim in the supply litigation. This is not impermissible forum shopping, and branding it as such cannot justify imposing the penalty of dismissal with prejudice—"a drastic sanction to be applied only in extreme situations." *Syracuse Broadcasting Corp.* v. *Newhouse*, 271 F.2d 910, 914 (2d Cir. 1959).

Kern does not even attempt to reconcile its charge of forum shopping with Tenneco's right under *Southern Construction* to pursue its counterclaim in either action. Tenneco quoted extensively from *Southern Construction* in its Petition, Pet. at 17-18, but Kern does not even cite, much less attempt to distinguish, that case in response. The reason is clear: this Court's decision in *Southern Construction* demonstrates that Tenneco's ac-

tions were fully justified and cannot be labelled impermissible forum shopping.

3. Kern seeks to obscure the conflict among the circuits on the interpretation of Rule 41 by noting that some of the cases cited by Tenneco upheld the granting of a motion to dismiss. Br. Opp. at 3, 14-15. In those cases, the Courts of Appeal held that voluntary dismissal was appropriate precisely *because* there was no prejudice to the other party beyond mere expense of preparation for trial. *See, e.g., McCants* v. *Ford Motor Co., supra*; *Puerto Rico Maritime Shipping Auth.* v. *Leith*, 668 F.2d 46, 50 (1st Cir. 1981); *Kern* v. *TXO Production Corp., supra.* Such cases *do* conflict with decisions—such as that below—upholding denial of voluntary dismissal when trial preparation was the *only* possible prejudice.

Kern's argument is that circuits that uphold granting dismissal when trial preparation is the only prejudice may also uphold denying dismissal under identical circumstances. Acceptance of such an argument would constitute complete abdication of appellate review in any abuse of discretion case. As Judge Friendly has noted, the appellate court in such a case is "bound to choose one way or the other," since "[t]he desirability of achieving consistency among district judges in the same circuit on such an issue and of ayoiidng judge-shopping outweighs that of appellate deference to a determination of the district judge." *Noonan* v. *Cunard Steamship Co.*, 375 F.2d 69, 71 (2d Cir. 1967). Kern's position would contravene the basic principle that "'[i]t will not do to decide the same question one way between one set of litigants and the opposite way between another.'" *Id.* at 71 n.2 (quoting Cardozo, *The Nature of the Judicial Process* 33 (1921)).

Those circuits holding that *granting* voluntary dismissal is appropriate when the only prejudice is the ex-

pense of preparation for trial necessarily are in conflict with those circuits holding that *denying* voluntary dismissal is appropriate under the *same* circumstances. *See* Pet. at 19-21. Contrary to Kern's assertion, Petitioner has not "fabricate[d] a conflict." Br. Opp. at 1. Indeed, courts and appellate judges themselves have frankly recognized the disagreement on this issue. *See, e.g., Quad/Graphics, Inc.* v. *Fass*, 724 F.2d 1230, 1233 (7th Cir. 1983); *Conafay* v. *Wyeth Laboratories*, 793 F.2d 350, 354 (D.C. Cir. 1986) (Scalia, J., dissenting). This Court should grant the writ to resolve the conflict and ensure uniform application of this important Federal Rule.

For the foregoing reasons, and those in the Petition, the Court should grant the writ and reverse the judgment below.

Respectfully submitted,

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